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No. 07-1566

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In The
Supreme Court of the United States

RICHARD LOUIS MARCRUM,

Petitioner,

v.

DON ROPER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR PETITIONER

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Respondent does not dispute the existence of a deep and acknowledged circuit split on the question presented:

> Whether courts addressing Sixth Amendment claims of ineffective assistance of counsel must determine *Strickland* prejudice for each error of trial counsel individually or whether they may evaluate the cumulative effect of counsel's errors to determine whether they undermine confidence in the outcome of the trial.

See Petitioner's Br. at 21-27 (describing three to five circuit split). Respondent also does not dispute that

the question is one of exceptional importance "at the heart of safeguarding a criminal defendant's constitutional right to effective counsel." *See* NACDL Br. at 2.

Instead, Respondent contends only that the court of appeals below ignored more than sixteen years of its own precedent and "actually performed 'cumulative assessment' of the prejudicial effect of counsel's errors." *See* Resp. Br. at 13. Respondent is wrong. The panel in fact applied well-established circuit precedent rejecting a cumulative approach.

In contrast to the First, Second, Seventh, Ninth, and Tenth Circuits, the Eighth Circuit has held consistently since at least as early as 1991 that the "cumulative impact" of counsel's errors *cannot* be the basis for a finding of *Strickland* prejudice. *See Girtman v. Lockhart*, 942 F.2d 468, 474-75 (8th Cir. 1991). The court of appeals has hewed to its holding in *Girtman* every time it has faced the issue. *See, e.g.*, *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996) ("Neither cumulative effect of trial errors nor cumulative effect of attorney errors are grounds for habeas relief."); *Hall v. Luebbers*, 296 F.3d 685, 692 (8th Cir. 2002) ("In our circuit a habeas petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test."); *Middleton v. Roper*, 455 F.3d 838, 851 (8th Cir. 2006) ("Therefore, we have no hesitancy in . . . concluding the cumulative effect of alleged trial counsel errors is not grounds for granting habeas relief."); *United States v. Brown*, 528 F.3d 1030, 1034

(8th Cir. 2008) ("we have repeatedly rejected the cumulative error theory of post-conviction relief").

The panel below followed, as it must, this well-established Eighth Circuit rule. Respondent's contention that the panel ignored this circuit precedent is particularly surprising when one considers that Chief Judge Loken, who joined the decision on *Strickland* prejudice in this case, also authored the opinion in *Brown* earlier this year and joined the decisions in *Middleton* and *Hall*. The panel's judgment – as clearly shown on the face of the opinion – rests on an individualized assessment of prejudice. The panel examined all four of counsel's errors seriatim without once assessing the cumulative effect of all of the errors.

First, the court of appeals dismissed any prejudicial impact of counsel's failure to timely disclose Marcrum's treating physicians, which resulted in their exclusion at trial, because it determined that there was no showing "that the various treating doctors would have added anything to the information shown in the medical records." App. 39 n.6.

Second, with respect to counsel's failure to introduce Marcrum's medical records, the court of appeals determined "it is not the failure to introduce the records themselves that would have changed (or had a reasonable probability of changing) the outcome of the trial" because the records were "couched in medical terminology that would mean almost nothing to a jury of lay people" and "there is no reason to think the

jury could have digested them and discerned a causal connection between lack of medication, serial seizures, psychosis, and paranoia and violence." App. 41. Rather than considering the obvious joint prejudicial impact of both failures – namely, that the treating physicians could have explained the medical records – the court of appeals instead determined that the medical records would have had no impact without "an expert's opinion." App. 42.

Third, with respect to counsel's complete failure to cross-examine the State's expert on his clearly erroneous testimony regarding Marcrum's medical history, the court of appeals again examined prejudice in isolation, stating that these "tactics would have done no good" because the defense expert agreed with the State's expert on certain points. App. 46.

Fourth, the court did not consider the prejudice resulting from counsel's failure to cure these errors with his own expert because counsel "obtained the assistance of a qualified expert." App. 49-50.

Not once did the court of appeals consider the cumulative prejudicial effect of all of counsel's errors. This effect was not trivial. In the court of appeals' own words:

> th[e] jury never saw or heard about medical evidence that, with scrutiny and analysis, could have shown a well-established pattern in which Marcrum failed to take his anti-convulsants, suffered from serial seizures,

> and fell into a psychosis in which his behavior was paranoid and violent. Nor did the jury see or hear about medical records from the night of the killing diagnosing Marcrum as psychotic and showing a sub-therapeutic level of anticonvulsant in his blood.

App. 36.

Respondent quotes the words "omissions" and "decisions" from various portions in the court of appeals' decision, but none of those portions include a cumulative analysis of prejudice. Indeed, as Respondent admits (Resp. Br. at 15-16), the non-cumulative approach of the court of appeals is highlighted by its disjunctive statement "that Marcrum suffered no prejudice from Speer's failure to introduce the medical records *or* cross-examine [the State's expert] Parwatikar." App. 49 (emphasis added).

Respondent also claims that the analysis must have been cumulative because the "court of appeals did not examine the 700 pages of medical records page by page, concluding there was no prejudice from each individual page." Resp. Br. at 15. But Respondent ignores the fact that the failure to introduce the medical records was a single error resulting from counsel's belief that the trial court excluded the records, rather than a series of errors involving each page of the records.

Respondent's final point that "'[n]o prejudice' plus 'no prejudice' equals 'no prejudice'" fails to account for the possibility that "the whole may be

greater than the sum of its parts." *Union Pac. R.R. Co. v. Hadley*, 246 U.S. 330, 332 (1918). As *amicus curiae* National Association of Criminal Defense Lawyers ably demonstrated, Respondent's argument violates the logical principle known as the fallacy of composition. *See* NACDL Br. at 14-18.

Respondent does not deny the importance of the issue, noted and left unresolved since *Banks v. Dretke*, 540 U.S. 668 (2004), and that resolution of this deep and long-standing division within the circuits is necessary to ensure the "fundamental fairness" of criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 696 (1984). This case presents an ideal vehicle to resolve this division. The court of appeals acknowledged the critical effect of counsel's errors – that the jury never heard that Marcrum was diagnosed as psychotic on the day of the killing and that this diagnosis was consistent with Marcrum's medical history – but it never analyzed the ultimate prejudice resulting from the accumulation of counsel's multiple errors.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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